No. 14,863

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED PRESS ASSOCIATIONS, a corporation,

Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES and the PIONEER PRINTING CO., a corporation,

Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

APPELLEES' BRIEF.

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STATEMENT OF THE CASE.

On or about June 30, 1945, the appellees, Sidney Dean Charles, Paul S. Charles, and Patricia Charles, a copartnership, doing business under the name of "Alaska Fishing News", entered into a written contract effective Oct. 3, 1945 with the appellant United Press Associations, a corporation, engaged in the business of accumulating and disseminating news reports and furnishing them to newspapers and radio stations throughout the country (R. 6-12). This

contract was prepared by the appellant on a printed form. The appellee Pioneer Printing Company, an Alaska corporation, is the successor to the Charles partnership, and in about April, 1948, this corporation took over the ownership and publication of the Alaska Fishing News, which was thereafter called the "Ketchikan Daily News" (R. 106). The contract which is the subject of the suit provided for a three year term, which was to be automatically extended for a period of five years unless notice was given within the time prescribed therein, by either party of an intention to terminate it. The prices to be paid for the service increased from time to time and many complaints were made of these increases and of the service. On February 21, 1950, a modification of the agreement effective Feb. 19, 1950 was executed by appellant and the Alaska Fishing News, although the Alaska Fishing News had ceased to exist at that time and the business had in 1948 been taken over by the corporation, Pioneer Printing Company, but the Pioneer Printing Company continued to abide by the terms of this modification which contained a slight reduction in cost for the service to be furnished (R 17, 18). It was provided that the original agreement between the parties should be extended by the length of time during which the suspension or modification of February 21, 1950, should be in effect. Modification effective Feb. 19, 1950.

The second term of the original contract would have expired on October 3, 1953. However, the modification went into effect on February 19, 1950, so that

when the time came within which either party could have cancelled the contract under the provisions of Paragraph Eighth of the original contract, which would have been on October 3, 1953, the modification had already been in effect more than three years, so that the expiration date or the date on which the original contract could have been cancelled had been extended for three years beyond October 3, 1953.

The appellees were publishing at Ketchikan, Alaska, a daily newspaper and depending upon the appellant for its news services, which included not only the news from the United States and the world in general but also Alaska news. Numerous complaints were made by the appellees to the appellant of the quality of the news service. These complaints were made by letter, by telegrams and in person to the Pacific Coast managers of the appellant. Some of the complaints were sent to the New York headquarters of appellant. There was a rival newspaper in Ketchikan, namely, the Chronicle, which was publishd daily and which was receiving news through the Associated Press. Many news items were going constantly to the Chronicle, news of great importance to the readers of the appellees' paper, which were not received by the appellees through its news service. These included not only news from the United States and the world but also important Alaska news. In fact, one of the appellant's correspondents in Juneau, Alaska, frequently sent as many as five or six articles in one day to the rival Chronicle, none of which were furnished through the United Press or otherwise to the appel-

lees. The record will show that many of the complaints made by appellees to the appellant, regarding this neglect or refusal to furnish the news service contemplated, were acknowledged by appellant and the record shows that on several occasions the appellant promised in writing to correct the defects in its service so as to adequately perform its part of the contract (R. 131-246). This, however, was not done and appellees were obliged to resort to a considerable additional expense in order to compete with the rival paper because of its lack of news which should have been furnished by appellant under the terms of the contract (R. 118-9). Finally appellees were obliged to make a contract with Associated Press also in order to get the news service (R. 118-9).

On February 14, 1954, the appellees notified appellant that because of the unsatisfactory service and the high prices which they had to pay for that service which was away beyond the original sum set forth in the contract, they were cancelling the contract. The record will show that this was done because of appellant's refusal to perform the terms of the contract as agreed upon. The service was thereupon discontinued.

On April 23, 1954, appellant began this action demanding judgment against the appellees for $21,489.57, representing appellant's claimed loss of profits. It was alleged in the complaint that the appellees had breached the contract. The claim for damages $21,489.57, is alleged to have covered anticipated profits from February 14, 1954, to September 27, 1962

The appellees answered the complaint of appellant setting up, in addition to the admissions and denials, three affirmative defenses and a counterclaim in the sum of $368.70. On June 4, 1954, appellant served and filed its reply to the counterclaim. Up until that time no jury had been requested for the trial of the case, but on August 5, 1954, appellees moved for a jury trial under the provisions of Rules 38(a) and 39(b) of the Federal Rules of Civil Procedure (R. 24). The court denied this motion (R. 25, 46 and 47). The court's denial was based upon a practice instituted by the judge of the Third Judicial Division, which had been followed by Judge Folta in the First Division.

Thereafter the case was set for trial before the court at Ketchikan on April 13, 1955.

On April 11, 1955, Judge Folta announced that he would summon a jury to try the case and submit to the jury the questions of fact. Appellant objected to the calling of a jury at that time, and the following day, on April 12, 1955, the judge entered a written order giving his reasons for calling the jury (R. 25). Counsel for the appellant, while objecting to the calling of the jury, made no motion or request for a continuance of the trial. He stated that he was taken by surprise and if he had known the jury was to be called, he would not have taken certain depositions but would have had the witnesses present in person.

The case then proceeded to trial before the jury on April 13, 1955. At the trial the appellant admitted

appellees' counterclaim in the sum of $368.70. Two forms of verdict were submitted by the court to the jury (R. 35, 36). The jury signed verdict No. 1 giving the plaintiff damages in the sum of $368.70, but offsetting against that the sum of $368.70, which was the amount claimed by the defendants in their counterclaim and admitted. The effect of this verdict was to give neither side anything.

The record shows that plaintiff-appellant made no motion for an instructed verdict and took no exceptions to the court's instructions save one, which is an exception to that part of Instruction 4 which instructs the jury to the effect that the terms of the contract under the circumstances would have expired on September 27, 1957, rather than September 27, 1962, as claimed (R. 205).

Thereafter appellant filed its motion under Rule 59 of the Federal Rules of Civil Procedure requesting the court to set aside the judgment which had been entered on the jury's verdict on April 22, 1955, and to make its own independent findings of fact and direct entry of judgment for appellant in the amount sued for or, in the alternative, to order a new trial (R. 29, 40). The court denied this motion by a minute order entered May 20, 1955 (R. 41). The plaintiff-appellant thereupon took an appeal to this court.

The appellant's statement of points to be relied upon in this court are found on pages 268 and 269 of the record. This statement of points is about identical with appellant's specifications of error contained in

its brief. We shall discuss these points in the order in which they are stated by appellant (R. 268, 269).

SUMMARY OF ARGUMENT.

Appellees' position is that no error was committed by the trial court; that the jury's verdict is amply supported by the great weight of the evidence; that the alleged errors complained of are highly technical, and if they may be considered as errors at all, they are harmless errors within the meaning of Rule 61, Federal Rules of Civil Procedure.

In our discussion of the four specifications of error, and the four points relied on by appellant (R. 268-9) we submit:

(1) That the trial court had the power to try the case with a jury, and that this authority is contained in both subdivisions (b) and (c) of Rule 39. That if the court did not summon the jury under subdivision (b) upon a reconsideration of appellees' motion of August 5, 1954, then it was done under subdivision (c) and the omission of the word "advisory", and the trial judge's apparent misconception of the circumstances permitting an advisory jury, are immaterial.

(2)(a) That there was no error in the only portion of Instruction No. 4 to which appellant took exception, for the reason that while the judge limited the period during which appellant could claim loss of profits in the event of a breach of the contract by appellees,

still since the jury's verdict shows that it did not actually award appellant anything for even this limited period, or if anything at all, only an insignificant amount, no harm was done, even if the instruction had been wrongful.

(b) That the portion of Instruction No. 4 complained of was correct; that the other portion of Instruction No. 4 assigned as error is not before this court because of the absence of any exception (R. 205).

(3) That the evidence of appellant's breach of the contract was so overwhelming, a judgment for appellees, based on the verdict of the jury was required, and that no judgment could have been entered for appellant in any event and especially in the absence of a motion for a directed verdict.

(4) That the order denying appellant's motion for a new trial or for judgment n. o. v. is not appealable and the appeal is taken from the judgment and therefore point No. 4 (R. 369) is superfluous.

(5) That it is apparent from the jury's verdict it did not intend to give either side anything. Therefore the jury, in order to accomplish this, could not possibly have rendered any other form of verdict except that submitted to it in the court's form of "Verdict Number One" (R. 35). However, even if it could be said that the jury actually decided for appellant, still, the undisputed evidence gave the jury the right and imposed on it the duty to take into consideration, in fixing the amount to be awarded,

the additional expense which appellant's dereliction had imposed on appellees, namely $600 a month for 2½ years and the cost of the additional Associated Press service (R. 119, 137).

(6) That if any of the alleged errors in appellant's assignments can be considered as errors, none of them affected the substantial rights of appellant, and they must be considered as "harmless" within the meaning of Rule 61.

That when the jury was ordered on April 11-12, 1955, while appellant urged that it would be prejudiced by not being able to have certain witnesses present in person, instead of introducing their testimony by deposition, it did not make any motion for a continuance.

That no motion was made by appellant for a directed verdict.

That no exception was taken to the second portion of Instruction No. 4, assigned as error (R. 205).

ARGUMENT.

1. WAS IT REVERSIBLE ERROR FOR THE COURT TO IMPANEL A JURY PURSUANT TO ITS ORDERS OF APRIL 11 AND 12?

Subdivisions (b) and (c) of Rule 39 of the Federal Rules of Civil Procedure read as follows:

> "(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made

of right, the court in its discretion upon motion may order a trial by a jury of any or all issues

"(c) Advisory Jury and Trial by Consent In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

The appellees made a motion for jury trial in August, 1954 (R. 24). This was denied by the court (R. 25) because of a practice in not exercising discretion to grant such motions, although Rule 38(b) vests that discretion in the court.

While the court may overrule or deny such a motion, there is nothing to prevent the court from reconsidering a motion of that nature and on reconsideration, granting it. It is true that appellees did not renew the motion at Ketchikan, or at any time or place, after it was denied by the court in 1954, but the appellees had not withdrawn the motion and as the late Judge Jennings frequently said: "The rules are made for the Court and not the Court for the rules." The court had a perfect right to reconsider that motion and to base the order for the jury trial thereon, and his reason for doing so, if that was in his mind, is made clear by his order of April 12 1955 (R. 25). An attack had been made upon the

judge by an attorney named Warren Taylor in the Legislature, and certain newspapers had criticized him for doing so, and included among them was the Ketchikan News. We should think that the court might have been commended for its action under the circumstances.

Now, if it may not be considered that the court did this and granted the jury trial upon a reconsideration of the motion made by appellees in August, 1954, still the court had the right of its own motion and its own initiative under Rule 39(c) to call an advisory jury to try any issue in the case. It is true the court did not call this an advisory jury and seemed to be of the opinion that the advisory jury was called only in equity cases, although the rule provides for the trial of "any issue" with an advisory jury.

Surely, the court had the right under either subdivisions (b) or (c) of Rule 39 to submit the case to a jury, and this is particularly so when we consider the provisions of Rule No. 38(a) which provides that the right of trial by jury shall be preserved inviolate.

We find the following in *Barron and Holtzoff,* Federal Practice and Procedure, Vol. 2, p. 598:

> "There are District Court cases arguing that the trial court has no discretion to grant a jury trial on motion after time for demand has gone by unless there are special circumstances excusing the oversight or default.
>
> "But these decisions place the emphasis in the wrong place. Technical insistence upon imposing a penalty for default by denying a jury trial is

> not in the spirit of the rules. If the issue is one which normally should be tried by a jury, there is nothing in the rules to limit the court's discretion in enlisting the aid of a jury. This is made clear by the cases in which the courts have exercised discretion in granting motions for jury trials where the default has been the result of a misunderstanding or an honest mistake or a bona fide but ineffectual attempt to conform with the rules or unfamiliarity with the rules, or if there is doubt whether a pleading allegedly served by mail was actually received so as to start the limitation running on the time for a demand."

Surely there would be included in these reasons the one given by the court in this case, for changing its mind under the attendant circumstances and either granting the motion made by appellees in August, 1954, or in calling an advisory jury on the single issue involved in this case, which was the issue of damages for alleged breach of contract. This was properly a jury case and the issue was one of fact and a proper one for a jury and a general verdict was in order and was rendered. The court adopted this verdict and entered judgment thereon, and there was no necessity for findings.

In *Supplies Incorporated v. Aetna Casualty and Surety Co.,* 18 Fed. Rules Dec. Vol. 18, p. 226, the District Court for the Western District of Pennsylvania, said in an opinion dated Oct. 26, 1955:

> "If the issue is one which normally should be tried by a jury, there is nothing in the Rules to limit the court's discretion in enlisting the aid of

a jury. See 2, Barron and Holtzoff, Federal Practice and Procedure, Sec. 892''

Appellant says it was taken by surprise by this order for the jury and it was prejudiced because having considered that the case would be tried by the court, certain depositions had been taken of witnesses in New York and San Francisco; that if appellant had known the case was to be tried by a jury, it would have had those witnesses present in person, and it was therefore prejudiced in being obliged to read the depositions to the jury instead of being able to bring the witnesses from New York and San Francisco so they could have been examined orally.

There is no rule of law which makes any distinction between oral testimony given by a witness in court, and that given by deposition. The only difference is that while both forms of testimony are oral, that given by deposition is reduced to writing and read to the jury.

> ''While testimony given orally in court, may, in particular instances carry more weight, or be more convincing than other testimony given by deposition in the same case, it may in other instances be less convincing.''
>
> *Am. Jur.* Vol. 16, p. 746, sec. 112;
>
> *Belser v. American Trust Co.,* 125 Cal. App. 344 at 350.

The record discloses that all the depositions taken by appellant were taken on oral interrogatories submitted in New York and San Francisco. There was

no representative or counsel present on behalf of de
fendants and there was no cross-examination. Thes
depositions should have been to the advantage of ap
pellant and not to its prejudice, for if the witnesse
had been present in court counsel for defendant
would have had an opportunity to cross-examine then
fully. In a deposition where the witness has notic
as in this case, the answers to the interrogatories ca
be prepared in advance. If the witness is on th
stand, he is much more vulnerable. The appellees als
had assumed that the case would be tried without
jury; and on April 13, 1955, they were in the sam
situation in this regard as the appellant.

A complete answer, however, to the claim of preju
dice on the part of appellant, is that appellant did no
ask for a postponement of the trial. The trial wa
in April, 1955, and the next regular term of cour
at Ketchikan would have been October, 1955. It doe
not appear that appellant should be able to clain
prejudice where it did not take any steps for a post
ponement. The case of *Sather v. Lindahl*, 261 Pac. 2
682, was a case where the plaintiffs produced fou
witnesses in a personal injury case, after having de
nied in a deposition any knowledge of any witnesse
to the accident. Defendant made no objection to th
testimony of these witnesses, cross-examined them, an
asked for no relief from the surprise until after th
jury had been instructed. After a verdict for plain
tiff, the trial court on motion of defendant grante
a new trial. The Supreme Court of Washington re
versed because defendant had not either objected to th

testimony of the four witnesses or asked for a continuance.

If the action of the trial judge in this case in ordering a jury trial on April 11, 1955, was based on a reconsideration of defendants' motion of August 5, 1954, then the case is within the rule (see *Roth v. Hyer,* 142 Fed. 2d 227). If plaintiff were surprised by that ruling and prejudiced as it claimed, it cannot complain now, for it made no request for postponement of the trial.

> "The right to a jury trial, of course, is fundamental and the courts should indulge every reasonable presumption against waiver of such right."
>
> *Container Co. v. Carpenter Container Corp. et al.,* 9 *Fed. Rules Decisions* 261 (Dist. Ct. Del.)
>
> Citing
>
> *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393.

In the case of *Consolidated Fisheries Co. v. Fairbanks Morse & Co.,* 9 F.R.D. p. 539, the District Court for the Eastern District of Pennsylvania ordered a jury trial of all the issues in the case, where plaintiff was entitled as a matter of right under the rules to a jury trial of only part of the issues.

It must be remembered that the issues in this case were wholly issues of fact and the only matter submitted to the court and jury were questions of damages.

If the jury impaneled in this case was actually an advisory jury within the language of the rule, and if

no representative or counsel present on behalf of defendants and there was no cross-examination. These depositions should have been to the advantage of appellant and not to its prejudice, for if the witnesses had been present in court counsel for defendants would have had an opportunity to cross-examine them fully. In a deposition where the witness has notice as in this case, the answers to the interrogatories can be prepared in advance. If the witness is on the stand, he is much more vulnerable. The appellees also had assumed that the case would be tried without a jury; and on April 13, 1955, they were in the same situation in this regard as the appellant.

A complete answer, however, to the claim of prejudice on the part of appellant, is that appellant did not ask for a postponement of the trial. The trial was in April, 1955, and the next regular term of court at Ketchikan would have been October, 1955. It does not appear that appellant should be able to claim prejudice where it did not take any steps for a postponement. The case of *Sather v. Lindahl,* 261 Pac. 2d 682, was a case where the plaintiffs produced four witnesses in a personal injury case, after having denied in a deposition any knowledge of any witnesses to the accident. Defendant made no objection to the testimony of these witnesses, cross-examined them, and asked for no relief from the surprise until after the jury had been instructed. After a verdict for plaintiff, the trial court on motion of defendant granted a new trial. The Supreme Court of Washington reversed because defendant had not either objected to the

testimony of the four witnesses or asked for a continuance.

If the action of the trial judge in this case in ordering a jury trial on April 11, 1955, was based on a reconsideration of defendants' motion of August 5, 1954, then the case is within the rule (see *Roth v. Hyer,* 142 Fed. 2d 227). If plaintiff were surprised by that ruling and prejudiced as it claimed, it cannot complain now, for it made no request for postponement of the trial.

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It must be remembered that the issues in this case were wholly issues of fact and the only matter submitted to the court and jury were questions of damages.

If the jury impaneled in this case was actually an advisory jury within the language of the rule, and if

the question and the issue was solely one of damages and the court accepted the verdict of the jury and based its judgment thereon, there would be no necessity for findings.

In the case of *Reliance Life Insurance Co. v. Everglades Discount Co.,* 204 Fed. 2d 937, at page 942, the United States Court of Appeals (5th Cir.) said:

> "There is no objection to the trial judge impaneling an advisory jury and adopting its findings of fact, even in an equity case."
>
> *Civil Rule* 39(c);
>
> *In re Pan American Life Ins. Co.,* 188 Fed. 2d 833 (5th Cir. 1951);
>
> *Hargrove v. American Cent. Ins. Co.,* 155 Fed. 2d 225 (10th Cir.);
>
> *Burkhard v. Burkhard,* 175 Fed. 2d 593 (10th Cir.);
>
> *Dickinson v. General Acc. F. & L. Ins. Co.,* 147 Fed. 2d 396 (9th Cir.).

In the last mentioned case, 147 Fed. 2d 396, the trial court had treated the jury's verdict as advisory, rejected it and made findings contrary to the verdict. This court reversed and held that to be error because the issues were factual.

In Volume 5, *Moore's Federal Practice,* page 720, 2d Edition, the subject of an advisory jury under Rule 39(c) is discussed and referring to the necessity of findings under Rule 52(a), Moore says:

> "While the trial court's duty to make findings should be strictly followed, where the record was so clear that the Appellate Court did not need the

aid of findings, it did not remand but affirmed the district court's judgment that had been entered in accordance with the advisory verdict" (page 726, Sec. 39.10(4)).

On page 722, Sec. 39.10(1), in referring to the case of *American Lumbermen's Mutual Casualty Co. of Illinois v. Timms & Howard, Inc.,* 108 Fed. 2d 497, we find the following:

> "We are inclined to agree with Judge Clark's approach. If there is any merit for the trial court's use of a jury in an advisory capacity for the trial of equitable issues, or legal issues upon which there is no right of jury trial (as in actions against the United States under the Tucker and Tort Claims Act) there must be similar merit in using the advisory jury for the trial of legal issues, where there was a constitutional or statutory right but the parties have waived it. In fact it is on the last type of issue rather than on the equitable issue that a jury is most likely to be helpful."

Then referring to Judge Murrah's counter argument in the case of *Hargrove v. American Cent. Ins. Co.,* 125 Fed. 2d 225, Moore goes on to say:

> "If the parties want a court trial, the court should not be able to impose a jury trial upon them. He is undoubtedly right that the court cannot on its own initiative impose a common law jury trial upon them. But the court is not doing this when it utilizes a jury in an advisory capacity. In effect the trial is a court trial, for the jury acts merely as an aid to the judge, since he must make his own findings of fact and conclusions of law

and must bear the ultimate responsibility for the judgment. This is why Judge Clark and Judge Murrah both come out at the same result—no reversible error in utilizing an advisory jury, although they differ in principle as to situations where the advisory jury may be used.

"Rule 39(c) is clear that it is within the district judge's discretion as to whether or not he will use an advisory jury, and he may act either *on his own* initiative, or on motion of a party."

"If the lower court treats the verdict as advisory and concurs therein, on appeal, if there was any error in treating the jury's verdict as advisory and concurring therein, such error would be harmless."

Pennsylvania Threshermen and Farmer's Mutual Casualty Ins. Co. v. Crapet, 199 Fed. 2d 850 (5th Cir.).

We submit that the trial court had the power to reconsider defendants' motion for a jury trial made on August 5, 1954, and in September, 1954, denied. That being so, the jury was impaneled and the case tried just as though the jury had been requested by either party within the time prescribed by the rule. If, on the other hand, the court called an advisory jury, this was clearly within the provisions of Rule 39(c), and since the jury decided the only issue there was in the case and the court adopted the jury's verdict and entered judgment thereon, findings would have been superfluous.

"The inherent powers of a court are such as result from the very nature of its organization and are

essential to its existence and protection and to due administration of justice. It is fundamental that every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. Such power has been exercised over the court's process to prevent abuses; to relieve a party in default; to grant bail, etc."

14 *Am. Jur.* page 370, Sec. 171.

"It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process."

Arkadelphia Milling Co. v. St. Louis S. W. R. Co., 239 U.S. 134, 145.

It is well established that a court, at any time in the proceedings of a case before it, may reverse a former ruling, especially where it does not affect property rights and where the result of the reversal does not substantially affect the rights of the parties. If appellant in this case foresaw any prejudice to its rights, the remedy was by motion for continuance, which was not made.

The principle of law above mentioned is greatly strengthened by Rule 61 relating to harmless error, which we shall discuss later in this brief. The trial was set for Wednesday, April 13. A continuance until Monday, April 18th would have given the witnesses ample time to have come from New York and San Francisco by airplane. But the presence of the

witnesses would have been a distinct advantage to appellees, for we could have then cross-examined them in court. We did not do that in the taking of the depositions.

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2. WAS THERE ANY ERROR IN THAT PORTION OF INSTRUCTION NO. 4 OBJECTED TO BY APPELLANT?

Appellant assigns as error the giving of two portions of Instruction No. 4 (R. 30, 31). These two portions are

(a) That portion which instructs the jury that the original contract would have expired on September 27, 1957, instead of September 27, 1962, as claimed by plaintiff; and

(b) That portion which reads as follows:

> "In determining the amount of damages, if you find that plaintiff is entitled thereto, you may consider . . . the probability of change during the period referred to in the rates, the cost of doing business, and the margin of profit, as well as the probability or improbability that defendants would remain in business."

Counsel for appellant at the conclusion of the instructions of the court took exception to the first part of Instruction No. 4 complained of, but no exception was taken to the other part of the instruction, designated herein as "(b)" (R. 205). The record shows at pages 204 and 205 that counsel for appellant took but one exception, as follows:

> "Mr. Dimond. I just want to take exception to part of Instruction 4 which instructs the jury to

> the effect that the term of the contract would expire September 27, 1957, rather than September 27, 1962."

Having taken no exception to the latter part of Instruction No. 4, appellant is not in a position to raise the question here.

With reference to (a) hereinabove, we submit that there was no error in the trial court's interpretation of the original contract and the modification thereof of February 21, 1950. We must bear in mind that both the contract and the modification were prepared by appellant, and under such circumstances the rule is well settled that if there is any ambiguity in such a contract, all doubts must be resolved against the party writing the contract. The "Modification of Agreement" dated at New York February 21, 1950, reduces the rate which was then being paid by the appellees for its news services from $72.52 per week to $52.52 per week. Paragraph 7 of that modification reads as follows:

> "The term of the agreement between the parties shall be extended by the length of time during which the above suspension is in effect."

The agreement mentioned is, of course, the original agreement between the parties. According to the terms of that agreement which went into effect October 3, 1945 (R. 11) the next expiration date after February 19, 1950, would have been October 3, 1953, but when October 3, 1953, arrived, there was already added to the expiration date the period from February 19, 1950, to October 3, 1953, or three years and eight months.

Before the original contract was terminated, the modi fication of February 19, 1950, had been in effect ap proximately four years. Therefore, we would add fou years to the date of October 3, 1953, and that would make it October 3, 1957. It will be observed that the original agreement is rather confusing as to dates and in paragraph 8 thereof (R. 10) it is stated tha it begins on September 1, 1945, and extends for three years with automatic renewals for periods of five years thereafter (R. 10). But in paragraph 12 (R. 11) this date is contingent on the commencement of daily publications by the appellees, and at the bottom of the 13th paragraph (R. 11), we find the following:

"Actually started Svce. 10/3/45".

Counsel's argument is that the four years during which the modification had been in effect between February 19, 1950, and the date of the termination of the original contract should be added to the expiration date of October 3, 1953, and that five years more should be added to that. But we think it is plain from a reading of the modification that if appellant had lived up to this part of the contract, the appellees instead of being able to give notice of termination on October 3, 1953, would have been compelled to wait after October 3, 1953, the number of years the modification remained in effect. That would have been October 3, 1957, so that under any circumstances appellees could have terminated the contract according to its terms and without any default or breach on the part of either party on October 3, 1957, by giving six months' notice prior to that date.

There is another reason why the position of appellant in this regard is untenable, and that is that since the verdict and judgment resulted in nothing for the appellant, it could not very well have been prejudiced by this part of Instruction No. 4. If the jury had given the appellant a verdict for its claimed loss of profits until October 3, 1957, and had been prevented from giving more or going beyond October 3, 1957, by the court's instructions, there might be some merit in the argument of appellant, but since appellant got nothing except a forgiveness of its admitted indebtedness to appellees of $368.70, the court's instruction in this regard could be nothing more at most than harmless error, which will be discussed hereinafter. However, we do not think it was even harmless error or any error for the court to so instruct the jury.

The general rule of law is found in 39 *Am. Jur.* 128, Sec. 118, where it is stated:

> "Ordinarily a trial court will not grant a new trial on account of error in giving instructions unless it is probable that the result of the trial was changed thereby. Accordingly an erroneous instruction is held not to be ground for a new trial if it is manifest that the complaining party was not in any way prejudiced thereby, or if the court can see from the whole record that even under correct instructions, a different verdict could have been rightfully rendered."

(b) Referring to the error claimed in the giving of the second part of the court's instruction, namely, that part which instructs the jury that they may take into consideration "the probability of change during

the period referred to in the rates, the cost of doing business, and the margin of profit, as well as the probability or improbability that defendants would remain in business", we think the record abundantly shows that appellant claimed its margin of profit fluctuated. The testimony of Mr. Belnap, a witness for the defendant (R. 67, 68) shows that in December, 1953 which was less than two months before the termination of the contract, the total revenue from the appellant's business in Alaska was almost $2.00 less than its expenses per week. Taking the record as a whole we find that appellants were for many years furnishing the appellees with inadequate service and not living up to the terms of the contract. We shall discuss this more in detail hereinafter. The rival newspaper was getting news every day and news of great importance which appellant was not furnishing to appellees under its contract, and the court undoubtedly had that in mind for in another part of Instruction No. 4 (R. 31) it is said:

> "The defendants contend that news of local importance was frequently omitted from that transmitted to them which prejudiced them in the operation of their newspaper business and in competing with the rival newspaper."

Therefore, when the court gave the last part of Instruction No. 4 complained of, the judge undoubtedly had in mind the possibility of the appellees being forced out of business through the failure, neglect or refusal of the appellant to live up to the terms of the contract and furnish the appellees with

sufficient news service to permit it to compete with its rival newspaper.

It is well settled, however, that where no exception is taken to an instruction, no error can be assigned to the Appellate Court thereon.

Another reason why, even if this portion of the instruction had been erroneous, it is not grounds for a new trial or for a reversal of the judgment, is because the appellees *had* remained in business from the date of the termination of the contract in February, 1954, until April, 1955, a period of fourteen months, and before any advantage could be taken of this, even if it were error, it could hardly be claimed unless the jury had first given the appellant a verdict for its claimed loss of profits from February 14, 1954, until April 13, 1955, at least. This, under plaintiff's claim of a total of over $21,000.00, would have been roughly something over $2,000.00. If the jury had given appellant that much and had been prevented by the instruction from assuming that appellees would remain in business any longer than the date of the termination of the trial, there might be some merit in the argument.

> "Error in adverse ruling without adverse effect may subject judge to criticism but not the case to retrial."
>
> *United States v. Parcel of Land, etc.,* 47 Fed. Supp. 30.

3. DID THE COURT ERR IN ENTERING JUDGMENT FOR A PELLEES AND IN REFUSING TO MAKE FINDINGS AN ENTER JUDGMENT FOR APPELLANT FOR A SUBSTANTIA AMOUNT?

(a) In support of this assignment of error appe lant in its brief alleges that appellees offered no sul stantial evidence to controvert that of appellant wit reference to the claimed loss of prospective profit We do not agree, when we consider the testimony c Mr. Belnap (R. 68) that just six weeks before th termination of the contract appellant was losing on it Alaska business approximately $2.00 a week.

Assuming, however, for the sake of argument tha this made no difference, no judgment could have bee entered for appellant in this case if it breached th contract itself, and we submit that the evidence i overwhelming that it was the appellant which breache the contract and not the appellees.

The evidence on this point was so voluminous, cor sisting in large part of scores of newspaper clipping showing important news to have been available an which should have been furnished appellees unde its contract, but which was not furnished; that it wa not practical to print all these exhibits in the record The original records, however, are before the cour

We call the court's attention to some portions o this evidence which we think was not controverted:

See testimony of Paul S. Charles, R. 111-120;

Testimony of Gene Brice, R. 149, 151-165;

Testimony of Marie J. Flood, R. 127-146, inclusive

Letter from Harry Carlson, appellant's manager in Seattle, to the Chicago and Portland offices of appellant, dated March 2, 1948 (Defendants' Exhibit G, R. 131-133), apologizing for poor service; in this letter Mr. Carlson admits that the appellant was not furnishing proper service, and he refers to the editor of the appellees' paper, Mr. Sid D. Charles, as having "the patience of Job", and that he is "justified in registering a vigorous complaint". Mr. Carlson then goes on to discuss failure to send very important news to the appellees;

Letter dated January 29, 1949, from the appellee to Mr. Molander, manager of the appellant in New York, registering complaints about poor service and listing many instances and stating that "Time after time we have been scooped on important Alaska news from Washington" (R. 133, 134);

Letter from Daily News to the appellant in New York (Attention Mr. Molander), dated December 27, 1949 (R. 136). In this letter the appellees complain that the cost of the news to the appellees is twice the amount paid by the rival newspaper to the Associated Press, and that the rival newspaper is getting twice the wordage for half the cost;

Letter dated January 14, 1954, from Mrs. Flood of the appellee's staff to Mr. Belnap, in which complaint is made of the ever increasing costs. That letter contains the following statement:

> "We have been constantly scooped on stories that are of interest to our area by the Chronicle that

carries Associated Press. In the past we ha made our own arrangements with Bob De A mond, who acted as your stringer to get covera on the last legislature'' (R. 141, 142).

Letter from the appellees to Harry Carlson dat April 16, 1948 (Plaintiff's Exhibit 9, R. 261-26 complaining of lack of accurate news in connecti with the Seattle earthquake;

Letter from Mrs. Flood to the appellant in N York dated November 14, 1953, with reference to ca cellation of contract and complaining of the ne coverage (Defendants' Exhibit G; R. 266).

Then throughout the record there are several lett from the appellant to the appellees promising bet service and acknowledging the defects. Among th is the letter from Mr. Bowerman to Mr. Charles the appellees' staff dated February 5, 1949 (Pla tiff's Exhibit 5, R. 246). Mr. Bowerman acknowledg the complaint on the coverage and concludes his let by stating as follows:

> ''Editorially my impression was that we we miles ahead of A. P. as a general rule, and I a glad to have it pointed out that there are defe in the coverage. We are going to work to reme this at once and you will be hearing direct fr Mr. Harry Carlson at Seattle thereon.''

It will be observed that in each of the letters fr the appellees to the appellant during the years prec ing the termination of the contract the complai consisted of both objections to the constant increas in cost along with poorer and poorer service on t

part of appellant. Many complaints were made by telegram (R. 111, 146). The letters from Mr. Sid Charles, editor of the appellees' paper, show that he was willing and anxious to cooperate with the appellant, and he was very patient with its shortcomings. Even Mr. Carlson acknowledged that in his letter in which he said that Sid Charles "had the patience of Job".

The record and exhibits show that frequently Mr. Charles would query the United Press and ask them to be sure to send items regarding very important news to the people of Alaska which was coming out of Washington, and even after the query while the rival paper got the news through the Associated Press, the appellees would not receive it through the appellant (R. 146).

An instance of the poor service furnished by appellant was in connection with news originating in Juneau and of paramount importance to all the people of the territory, as Juneau is the capital of Alaska and the headquarters for the federal and territorial officials.

In Plaintiff's Exhibit 9 (R. 249) there is a letter dated October 14, 1946, from Mr. Charles to the United Press Association with reference to this news service from Juneau. Mr. Charles said in that letter it had been his understanding that the correspondent there would send the news to him direct without need of clearing it through the Seattle office, but that the appellees had not received a thing from Juneau for a long time. This is only a small portion of the evidence

with reference to the breach of contract on the pa
of appellant, and in the portion to which we have r
ferred hereinabove it was shown that appellant h
not furnished the appellees with news of great impo
tance to all the people of the territory, and partic
larly to the people of Ketchikan, although it was
carried in the rival newspaper, the Chronicle. Su
things as the records of deaths in the Seattle eart
quake, a resolution passed by the Western Governo
Conference at Sacramento urging statehood f
Alaska, news regarding the settlement of Indian a
cestral claims to a large portion of the territory, a
news of particular importance to the people of Ketc
kan with reference to timber sales and the comi
of a large pulp mill to the Ketchikan area, whi
proved to be by far the most important developme
ever undertaken in the territory, were not furnish
by appellant to appellees (R. 111-115 and Defendan
Exhibit H, not printed).

The Defendants' Exhibit H which is not print
contains several score of newspapers and newspap
clippings showing articles of considerable importan
emanating from Juneau sent by the United Pre
representative in Juneau, Mr. George Sundborg,
the rival paper, the Chronicle, which were not receiv
by the appellees either direct from Mr. Sundbo
United Press Correspondent in Juneau, or from t
United Press itself under the terms of the contra

It may be pointed out that in the testimony of M
Brice, who compared the two newspapers publish
in Ketchikan, he admitted that while he had list

perhaps 200 items, there were probably three or four on which some service was made by the appellant to the appellees but in comparing the great number of papers which Mr. Brice was called upon to compare, it is not surprising that of about 200 he omitted only three or four; but it is significant that the appellant before the trial had submitted to the appellees certain interrogatories asking for specific instances where the appellant had failed to furnish an adequate news service. These interrogatories were answered months before the trial and they consisted of 69 separate paragraphs giving specific dates and items of news omitted from the service furnished by the appellant, and yet with this information before them, appellant could find only four mistakes. When it came to the trial, of course, Mr. Brice was able to add many other instances to the 69 paragraphs which had been already furnished the appellant (R. 170).

An examination of Defendants' Exhibit H shows as many as four or five items in one day furnished the Chronicle, the rival newspaper in Ketchikan, by the appellant's own correspondent in Juneau, none of which were furnished the appellees.

(b) Perhaps what we have said in subheading (a) is superfluous, for we do not think that this matter is before this court at all, for the reason that appellant made no motion for an instructed verdict, and that is a prerequisite to raising the question on appeal.

The rule as we find it in *Een v. Consolidated Freightways,* 220 Fed. 2d 82 (8th Cir.), would seem to be as follows:

"1. On appeal from judgment on verdict, dence must be viewed in light most favorabl prevailing party; . . .

"2. Whether the evidence is sufficient to sus a jury verdict cannot be considered by the ap late court where the appellant did not reque directed verdict in the trial court.

"3. Where the whole record of the trial ab dantly sustains a judgment, even if error has committed in the introduction of testimony, error is considered harmless within the mean of Rule 61, F.R.C.P."

"An appellant can not on motion for new t or on appeal, raise the question of the insufficie of the evidence unless he has first moved fo directed verdict at the conclusion of all of evidence."

Boudreau v. Mississippi Shipping Co., 222 F 2d 954 (5th Cir. 1955);

Moore v. Louisville & N. R. R. Co., 223 Fed 214 (5th Cir. June, 1955);

O'Malley v. Cover, 221 Fed. 2d 156 (8th 1955).

Appellant discusses this assignment in relation the amount of damages which the appellant claim but before any damages could be awarded to appell it would have been necessary to first determine appellees had breached the contract. This quest of course, is a part of the consideration of the d ages, but even this question of whether or not the pellees breached the contract cannot be raised her the absence of a motion for instructed verdict. T

is the heart of the case, for if the appellants themselves breached the contract, there could be no damages, and the verdict of the jury was proper; but in any event, the question cannot be raised on appeal, because there was no motion for instructed verdict.

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4. CAN THE ACTION OF THE TRIAL COURT IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BE REVIEWED IN THE APPELLATE COURT?

The appeal in this case is taken from the final judgment (R. 41). It would seem, therefore, that the fourth specification of error is superfluous. If it is not, then we suggest that this court has many times held that an order denying a motion for a new trial is not appealable.

Libby, McNeill & Libby v. Alaska Industrial Board, 215 Fed. 2d 781 (9th Cir. 1954), and cases cited therein.

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5. VERDICT.

The appellant insists that the verdict (R. 35) was for the appellant, and that being so, the amount under the evidence should have been much greater than the amount awarded it.

This verdict at first glance may seem a little confusing and illogical, but not so when we consider all the evidence.

The jury was handed two forms of verdict by the court and the first form was for use in case the jury

found for the appellant in a sum greater than t
sum of $368.70, which was the appellees' countercla
admitted by appellant (R. 73-74). The second fo
was a verdict for appellees. The court did not expl
these forms to the jury, but said they were "se
explanatory" (Inst. No. 11, R. 34).

Apparently the jury considered only the form
Verdict No. 1. They were bound under this form
deduct $378.70 from any amount to be inserted
line 3 of the verdict in the blank space which w
provided (R. 35). Since they could not deduct $368
from anything less than $368.70, they filled in t
same thing on line 3. We must remember that wh
this form of verdict was handed the jury the amou
to be filled in on line 3 (R. 35) had been left bla

The appellees' counterclaim was for some payme
made by the appellees after the contract was ter
nated. The jury may well have felt, for some reas
that these payments should have been paid by the a
pellees. We are not permitted to speculate on th
reason, but their verdict simply cancelled out all clai
of one side against the other.

The Federal Rules require, we think, that we mu
look through the form to the substance in such matte
and looking through the form and considering all t
circumstances, it is apparent that the jury intend
by its verdict to award nothing to either side.

The trial court took this view, for we find the follo
ing in the court's order denying costs to either pa
(R. 215):

> "It is obvious that what the jury wanted to do is not allow either party anything, and it seems to me we have got to disregard the form of their verdict and view it merely as a device to award nothing to either party, and viewing it that way, then who is the prevailing party? * * * Well, I am inclined to think that each party should pay its own costs. I have felt that way from the time that the verdict was returned and noting that it was merely a device to avoid awarding anything to either party, so it will be the order of the Court that each party will pay its own costs."

It will be, I think, technical to say that appellant was the prevailing party. Even if the jury could have possibly found for appellant, in the face of the overwhelming evidence of the breach of the contract by appellant, and had found that the appellees had breached the contract, still it had the right and duty to assess appellant's damages in whatever sum appeared right to the jury; but it must be apparent, as Judge Folta said, that the verdict meant that neither side should recover. This is apparent, if we consider the two forms of verdict as submitted, bearing in mind that there was a blank space on line 3 of Verdict No. 1 for the insertion of the amount.

If the jury had decided that neither side should recover, as it seems certain they did, then there was no other form of verdict they could return; that is to say, there was no other way in which they could have returned one of the verdicts submitted, and they returned the only form by which they could accomplish the result.

If they had signed the first verdict without ins
ing anything in the blank space, then appellees wo
have prevailed. If they had signed the second fo
of verdict which had the figure of $368.70 inserte
represent appellee's claim, appellee would have
vailed. If they had inserted more than $368.70
Form No. 1, then appellant would have prevai
They could have done nothing other than they
in order to accomplish their purpose, which obviou
was to find no damages for either side.

The case of *Smith v. Philadelphia Transport*
173 Fed. 2d 721, was before the United States C
of Appeals, for the 3rd Circuit. In that case
interrogatories or special verdicts had been submi
to the jury and they came in with their answers
awarded the plaintiff in the case $500.00 on one cl
and $10,000 on another claim in which only $527
had been demanded. The court held that it was
parent the jury had made a mistake and it orde
the answers to the special questions to be transpo
and be set opposite the proper questions. The c
held that the mistake in the verdict of the jury or
answers to the special questions constituted harm
error.

In this case the record abundantly shows that if
jury had undertaken to write its own verdict, it wo
have brought in a verdict stating simply that it fo
for neither side, but of course, it felt bound to fol
one of the forms submitted by the trial court.

Even if it could be said, as contended by appell
that in finding $368.70 for appellant the jury n

have found that the appellees had breached the contract, still the jury had a wide latitude in the amount of damages it would award the appellant.

Conceding for the sake of argument only, that the jury did find a breach by appellees, they must have also found that appellant was entitled to little more than nominal damages. They could well do this under the evidence. Appellant had not been furnishing the news service as agreed, although they furnished some. Appellees had been obliged to supplement this news service at a cost of $600 a month for 2½ years (R. 119). They eventually had to take the Associated Press service also in order to get the news (R. 118). This cost approximately half as much as appellant's service (R. 137). This testimony is undisputed, and the jury may have very well considered that even if appellees had breached the contract, the damage to appellant was very slight.

In the case of *United Press Associations v. Natl. Newspaper Assn.,* 254 Fed. 284 cited in appellant's brief there appears to have been no such uncontroverted evidence of facts which could have impelled the jury to reduce the verdict to $500.00.

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6. HARMLESS ERROR.

Aside from the arguments we have made in answer to appellant's specifications of error and the comments we have made on the verdict, it would appear that since no substantial rights of the appellant were affected by the verdict even if the trial court had erred

in calling the jury and in giving those portions
Instruction No. 4 complained of, and in basing
judgment on the verdict, it was harmless error wit
the meaning of Rule 61, Federal Rules of Civil P
cedure, which reads:

> "Rule 61. *Harmless error.* No error in either
> admission or the exclusion of evidence and
> error or defect in any ruling or order or in a
> thing done or omitted by the court or by any
> the parties is ground for granting a new trial
> for setting aside a verdict or for vacating, modi
> ing, or otherwise disturbing a judgment or or
> unless refusal to take such action appears to
> court inconsistent with substantial justice.
> court at every stage of the proceeding must
> regard any error or defect in the proceeding wh
> does not affect the substantial rights of
> parties."

Looking at the record as a whole, it is clear t
whether the case was tried by the court or whet
it should be tried again with the changes in the
structions and rulings of the court and the forms
verdict submitted to the jury, the result would
the same.

> "If there is no likelihood that a retrial wo
> result in a different verdict, a new trial will
> refused."
>
> *Bruner v. Knickerbocker,* 4 Alaska 387.

This court applied the rule regarding harmless er
in the case of *Rudeen v. Lilly,* 199 Fed. 2d 300, at

In the case of *Daniels v. Goldberg,* 173 Fed. 2d
the jury in the trial court had requested that the te

mony of a certain witness, Dr. Klein, be read to them after they had retired. They then found a verdict for plaintiff. It was discovered afterward that the reporter in reading the testimony had inadvertently omitted a portion. This was one of the grounds urged in the United States Court of Appeals for the Second Circuit for reversal. The court disposed of the matter in language as follows:

> "That part of Dr. Klein's testimony which by inadvertence was not read to the jury contained nothing of significance which would have affected the jury's verdict."

The court had a right to reconsider appellees' motion for a jury and to grant it if he saw fit. He also had the right to call an advisory jury, and although he did not consider this an advisory jury, still that would make no difference. He certainly had a right to call a jury on one ground or the other, and the fact that this might have been an advisory jury within the meaning of the rule and the judge had omitted the word "advisory" or thought it did not apply, would seem to make no difference under Rule 61, and it would be not only harmless error but highly technical.

In the case of *World Fire & Marine Insurance Co. v. Palmer,* 182 Fed. 2d 707, at 712, the Court of Appeals for the Fifth Circuit had been asked to reverse a judgment of the District Court in favor of plaintiffs. The Court of Appeals said:

> "Even though we do not approve of the reasoning of the trial judge, he reached the right result and consequently no error appears."

See, also:

Miller v. Mutual Life Ins. Co., 17 Fed. R
Dec. 121.

The Federal Rules are designed to eliminate tec
calities, simplify procedure, and do away with un
essary appeals, and there are many things which v
formerly held to be grounds for a new trial which
not now.

In the case of *Alaska Fishermen's Packing Co*
Chin Quong, 202 Fed. 707, at 713, this court
where the defendant had set up a counterclaim
plaintiff's demands, it was not material that the t
court may have excluded evidence on the meas
of damages alleged by defendant, where the jury
awarded defendant nothing but had brought in a
dict for plaintiff. This court said (page 714):

> "The whole contention becomes immaterial
> view of the fact that the jury found no dama
> for defendant. The error, if error there was,
> thereby made immaterial." (Citing *Cunningi*
> *v. Springer,* 204 U.S. 647.)

These cases were decided before Rule 61
adopted, and there is much more reason for the ap
cation of the doctrine of harmless error under
rule than there was before it was made applicabl

In the case of *McCandless v. United States,* 74 F
2d 596 (9th Cir.), this court held that the court be
committed error in denying certain offers of pr
submitted by defendant, but that the denial was
prejudicial.

Citing

Simpson v. U. S., 289 Fed. 188;

Armstrong v. U. S., 16 Fed. 2d 62, 65,

also decided by this court.

Again this court said in another Alaska case, *Hoogendorn v. Daniel,* 202 Fed. 431, at page 433:

> "Unless it can be shown that prejudice has resulted from error of the trial court, prejudice will not be presumed."

In the case of *Smith v. United States,* 63 Fed. 2d 252, the Court of Appeals for the Seventh Circuit held:

> "Appellant must show evidence at the trial was so overwhelming in his favor that a contrary finding should not be allowed to stand."

Rule 61 was applied by the Eighth Circuit in *Walsh v. Bekins Van Line Co.,* 217 Fed. 2d 388 (1954), where the court held that

> "Unless an appellant can show from the entire record the denial of some substantial right there will be no reversal."

In the case of *Sneed v. United States,* 217 Fed. 2d 912, 914, the Court of Appeals for the Fourth Circuit concluded that certain testimony was incompetent, but harmless, in view of all the other evidence, and that Rule 61 applied.

See, also:

Psiriakis v. Psiriakis, 221 Fed. 2d 418 (3rd Cir. 1955).

CONCLUSION.

We submit that the great weight of the evide in this case shows that the appellees were enti to prevail and that the appellant had breached contract. The judgment should be affirmed for reasons hereinabove discussed, namely, that the c properly submitted the case to a jury either ur Rule 39(b) or 39(c); that the instructions were rect; that the verdict was more than amply sustai by the evidence; and that this verdict in ef awarded nothing to either side.

While the order for the jury might have b actually more specific and the court might have ca it "an advisory jury", and while the court might h made findings based on the verdict, all these mat would have been superfluous, and if any error ca charged in the proceedings, it was harmless e within the meaning of Rule 61, Federal Rules Civil Procedure; and in this connection, we wish repeat and emphasize the fact that when counsel appellant complained that he would be prejud by the calling of the jury, he should have asked a continuance of the trial. The decision of the c to call a jury on April 11, 1955, found appellee the same position as it found appellant, becaus that time the appellees had also prepared for a t before the court.

We also wish to repeat and emphasize the fact appellant cannot now complain of the verdict, a

made no motion at the conclusion of the trial for an instructed verdict in its favor.

The judgment should be affirmed.

Dated, Juneau, Alaska,
February 8, 1956.

Respectfully submitted,
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